Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1994

GLADIES M. HERRON,

Petitioner,

v.

TENNESSEE BOARD OF REGENTS and JAMES R. VADEN, Treasurer and Vice Chancellor, Tennessee Board of Regents, in his individual and official capacity,

Respondent.

PETITION FOR WRIT A OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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74

QUESTIONS PRESENTED

1. Whether the Court erred when it granted a motion for summary judgment against the petitioner on the grounds the petitioner did not present evidence in response to the respondents' motion for summary judgment and where the District Court entered an order to stay discovery, thus denying the petitioner an opportunity to conduct discovery, and where the motion to stay discovery was predicated on the notion that summary judgment would turn on issues of law and not issues of fact; e.g., statute of limitations and sovereign immunity.

2. Whether a genuine issue of material fact exists which would preclude the Court from granting a motion for summary judgment in favor of the respondents where the respondents did not factually establish

the conduct of the petitioner constituted misconduct which would have justified dismissing the petitioner from her employment and where the respondents did not factually identify any breach of the employment contract.

3. Whether the Court erred in not giving preclusive effect to certain findings of fact of the State Administrative Hearing where said certain issues of fact were fully adjudicated and the respondents' appealed said administrative decision through the entire administrative appeal process.

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Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States

Court of appeals for the Sixth Circuit entered in the above-entitled proceeding on November 29, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit have not been reported. The opinion of the United States District Court for the Middle District of Tennessee has not been reported.

STATEMENT OF JURISDICTION

Petitioner filed her complaint seeking damages and injunctive relief for alleged violations of 42 U.S.C. §2000e, et seq., 42 U.S.C. §1981, and §1983 and pendente state law under the Tennessee Human Rights Act at Tennessee Code Annotated, §4-21-101, et seq., in the United States District Court for the Middle District of Tennessee on December 20, 1992.

The case was decided upon the defendants' motion for summary judgement which was granted pursuant to an order entered on October 8, 1993.

Petitioner filed a timely notice of appeal. On November 28, 1994, the Sixth Circuit issued its opinion affirming the district court. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

§703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a):

It is unlawful employment practice for an employer --

. . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 56(c):

...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

STATEMENT OF THE CASE

The petitioner, Gladies M. Herron, began her employment with respondent, Tennessee Board of Regents (hereinafter, respondent TBR), as a Financial Management Analyst, II from July 18, 1983 until May 20,

1991. The petitioner is an African-American and at the time of her employment had a Master of Arts Degree in Business Administration, was a Certified Public Accountant, and was soon awarded an Associate of Science Degree in Computer Accounting Technology. During the course of her employment, the petitioner was the only African-American employee holding the position of Financial Management Analyst, II.

During the course of her employment, the petitioner was offered a promotion to the position of Financial Management Analyst, III. Although the published salary range for said position was between $40,000.00 and $50,000.00 per annum, the petitioner was offered only $37,000.00 as her starting salary at the new position with no explanation as to why she was not offered the published minimum salary of $40,000.00.

In 1990, the petitioner was again offered the position of Financial Management Analyst, III with an annual salary of $38,523.00 with no explanation as to why she was not offered the published minimum salary of $40,000.00. The petitioner declined both promotions on the grounds that she should have been offered the published minimum salary as was provided for her similarly situated white counterpart co-worker.

Later in 1990, the petitioner served as Interim Business Manager at Shelby State, a college under the control of TBR at a prorated annual salary of $43,523.00. Said salary was approximately $6,000.00 less than the starting salary for said position. Again, TBR offered no explanation as to the disparate salary treatment the petitioner suffered.

The petitioner did not charge racial discrimination concerning her position and

salary treatment at the time it was committed because she relied upon the representations of the respondents that they were an equal opportunity employer. The charge of racial discrimination did not surface until the petitioner filed her lawsuit in District Court because it was not until her termination that the petitioner realized that the respondents never intended to enter into a racially neutral contract with her, and they concealed that fact from her until the time of her termination.

In 1988 the petitioner decided to pursue her doctoral degree in education and applied for and received aid in paying for her tuition from the respondents in the guise of a grant-in-aid pursuant to Geier v. Alexander, 593 F. Supp. 1263 (M.D.Tenn.1984), wherein respondent TBR enacted a black faculty and staff development program labeled as a grant-in-

aid program. The petitioner also applied for and received aid from Peabody College, a college affiliated with Vanderbilt University, in the form of a half-tuition scholarship. The only stipulation placed upon her tuition aid from TBR was that she was to accept no other financial assistance which imposed a conflicting service obligation. The scholarship money she obtained from Peabody College required no service obligation.

On April 17, 1991 the petitioner was informed by the respondents that she had breached an implied trust in her employment contract for receiving the funds from Vanderbilt University and that her employment was to be terminated.

After her employment was terminated, the petitioner filed a charge of discrimination with the EEOC upon which the

EEOC issued a notice of right to sue on December 1, 1992.

After petitioner was discharged, the Tennessee Department of Employment Security, acting in a judicial capacity, conducted a hearing between the petitioner and the respondents on June 7, 1991. Said hearing was conducted to determine whether the petitioner would be eligible for unemployment benefits and focused upon the issue of whether the petitioner had engaged in willful misconduct regarding the Vanderbilt University doctoral scholarship. The agency found that the record and evidence did not show the petitioner had committed intentional misconduct relative to the doctoral scholarship. The agency hearing was appealed to the Tennessee Department of Employment Security Appeals Tribunal, whereupon the agency decision was affirmed. The Appeals Tribunal decisions

was appealed to the Tennessee Department of Employment Security Board of Review. The Board of Review affirmed the decision of the Appeals Tribunal and specifically and conclusively found that the petitioner did not intend to "receive duplicate financial aid for the same expenses."

On December 30, 1992 the petitioner filed her complaint in the United States District Court for the Middle District of Tennessee, Nashville Division. The petitioner previously filed a complaint in the Chancery Court of the 20th Judicial District of the State of Tennessee well within the statute of limitations, pursuant to Tennessee Code Annotated §28-3-104. Relying on the Tennessee saving statute, Tennessee Code Annotated §28-1-105, which would allow her a year to refile her lawsuit after taking a voluntary nonsuit, the petitioner took a voluntary nonsuit in state

court and refiled her lawsuit in federal court within the one (1) year saving period.

The respondents subsequently filed a motion to dismiss and/or for summary judgment with a memorandum of law in support of their position. The petitioner answered the motion with a response and a memorandum of fact and law in support of the proposition that the complaint was well drafted and pled and there were genuine issues of material fact which could only be resolved at trial and prayed the motion be denied.

The respondents then filed a motion to stay discovery on April 1, 1993. The motion to stay discovery was predicated upon the theory that the motion for summary judgment could be decided upon issues of law, i.e. statute of limitations and sovereign immunity. On the face of the motion itself is evidence that the petitioner had begun

discovery where the motion stated that the petitioner's "outstanding discovery is directed solely to the merits of the case. (Appendix, R - 33-35). Finally, the purpose of the motion was to allow counsel to narrow the issues and to complete the pretrial discovery, if necessary, in the most effective manner." (Id.). Of course, the petitioner would not object to such a motion because it was predicated on issues of law and the interest of economy.

The motion to stay discovery was grated by the trial court. Thus, the petitioner was foreclosed from receiving the answers to interrogatories which she had propounded to the respondents, and was foreclosed from conducting further discovery.

On October 8, 1993 the Court granted the respondents' motion for summary judgment stating that there was no genuine issue of a material fact and that the respondents were

entitled to judgment as a matter of law. The District Court stated that the petitioner had sufficient time for discovery but had failed to produce any evidence which would substantiate her claim. (R - 47). Subsequently, the petitioner filed a timely notice of appeal with the District Court.

REASONS FOR GRANTING THE WRIT

I

THE DISTRICT COURT SHOULD BE PRECLUDED FROM GRANTING A MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF INSUFFICIENCY OF EVIDENCE BY THE NONMOVING PARTY WHEN AN ORDER TO STAY DISCOVERY IS IN EFFECT AND WAS ENTERED RELATIVELY EARLY IN THE PROCEEDINGS AND BEFORE THE NONMOVING PARTY HAD AN OPPORTUNITY TO CONDUCT DISCOVERY.

The question is whether the Court erred when it granted a motion for summary judgment against the petitioner on the grounds the petitioner did not present

evidence in response to the motion for summary judgment and where the Court entered an order to stay discovery thus denying the petitioner an opportunity to conduct discovery, and where the motion to stay discovery was predicated on the notion that summary judgment would turn on issues of law and not issues of fact; e.g. statute of limitations and sovereign immunity.

Federal Rule of Civil Procedure 56 provides that a summary judgment may be granted if a moving party can demonstrate to the Court that there is no genuine issue of material fact for trial. This Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed. 2d 202 (1986); Cleotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed. 2d 265 (1986); and Matsushita Electric Industrial Corp. v. Zenith Radio, 475 U.S. 574 (1986) defined and set the standard for the applicability of a summary judgment in the

federal courts.

In Anderson v. Liberty Lobby, Inc. (hereinafter Anderson), the Court placed a heavy burden upon the nonmoving party to come forth with evidence that would meet the affidavits or other materials submitted by the movant which would show that there would be an issue of material fact to be tried. This Court in Anderson recast summary judgment into the standard of a directed verdict. Anderson, 477 U.S. at 250. This Court explained the nature of a motion for summary judgment by stating:

> Rule 56C of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that the mere existence of some alleged factual dispute

> between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.
>
> As to materiality, the substance of law will identify which facts are material. Only disputes over facts that might effect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.
>
> 477 U.S. at 247-248.

In Anderson, this Court emphasized that the trial judge was not to weigh the evidence, rather the trial judge was only authorized to award a summary judgment only if the evidence would be so one-sided that the moving party would be entitled to a verdict as a matter of law. Anderson, 477 U.S. at 251-252.

However, more pertinent to this case is the case of Cleotex Corp. v. Catrett, *Supra*, (hereinafter Cleotex Corp.). Much of this

Court's teachings in Cleotex Corp. is predicated upon the notion that a motion for summary judgment is to be considered after adequate time for discovery. A plain and fair reading in the holding of Cleotex Corp. will place the burden upon the moving party to present sufficient evidence which, if not rebutted, would show a fatal flaw in the nonmoving party's case. Implicit in the holding is the underlying theme that the moving party's affidavits and other evidence must be relevant to the case and demonstrate that no genuine issue of material fact exist or that the nonmoving party cannot prove its case. If the motion for summary judgment satisfies that standard, then the nonmoving party must be afforded the opportunity to rebut the motion through discovery or other evidence. 477 U.S. at 326.

The memorandum filed by the Court contemporaneously with the order granting

summary judgment was predicated upon the facts rather than upon the stated purposes of the motion for summary judgment. (Appendix, R - 36-48). The petitioner was in effect blindsided when the District Court granted summary judgment on the facts and the lack of the petitioner's evidence and not upon the issues of law as defined in the motion. It is self-evident that the petitioner's hands were tied as to her ability to go after evidence through discovery when she was under an order not to conduct discovery.

Thus, the rendering of a summary judgment upon the facts without a motion for a judgment on the facts was the equivalent of a summary judgment sua sponte. As this Court stated in Cleotex Corp., "[T]he fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing

party was on notice that she had to come forward with all of her evidence." 477 U.S. at 326. Here, not only was the petitioner not on notice that she had to come forward with all of her evidence, she was precluded from acquiring her evidence for presentation.

The Court of Appeals affirmed the summary judgment and stated that the petitioner "filed no motion under Rule 56(f) of the Federal Rules of Civil Procedure asking for a continuance. Instead, her response provided no compelling reason to justify a continuance and set out no specific reasons demonstrating the need for further discovery." (Appendix, R - 49-67). As the motion to stay discovery stated, the narrowing of issues would "allow counsel to narrow the issues and complete the pretrial discovery, if necessary, in the most cost effective manner." (Appendix, R-33-35). To

file a motion for a continuance or to allow discovery when the issues were supposed to have been narrowed to issues of law would have been an exercise in waste, the result which the motion to stay discovery sought to avoid.

This Court is therefore invited to grant this writ in order that the burden placed upon a nonmoving party in a motion for summary judgment may be clarified. This writ should also be granted in order to prevent a grave injustice which would follow if a nonmoving party in a motion for summary judgment had her hands tied as a result of a court order having stayed discovery, only to have the court grant the summary judgment because the petitioner had not conducted discovery.

II

THE DECISIONS BELOW RAISED IMPORTANT QUESTIONS REGARDING THE STANDARD OF PROOF AND PRODUCTION

WHICH MUST BE SATISFIED BY A MOVING PARTY IN A MOTION FOR SUMMARY JUDGMENT.

On the question of whether a genuine issue of material fact exists which would preclude the Court from granting a motion for summary judgment in favor of the respondents where the respondents did not factually establish the conduct of the petitioner constituted misconduct which would have justified dismissing the petitioner from her employment and where the respondents did not factually identify any breach of the employment contract. The petitioner asserts that material facts do exists as to whether her firing for a breach of trust was pretextual and whether the district court's holding that no genuine issue of material fact exists is error.

This Court in Liberty Lobby, *Supra* placed the burden upon the nonmoving party to come forth with evidence that would meet

the affidavits or other materials submitted by the movant in a motion for summary judgment which would show there would be an issue of fact to be tried. Although, this Court in Liberty Lobby placed a heavy burden on the nonmoving party to meet a motion for summary judgment with affirmative evidence in order to survive the motion, implicit in the holding is the requirement that the facts presented by the moving party be material and go to strike at the heart of the nonmoving party's case. Whether an issue is material to the case is determined by the substantive law of the case. 477 U.S. at 2510. Also implicit in the holding is the initial burden of establishing a nonexistence of a genuine issue of material fact is placed upon the party who moves for summary judgment. If the moving party has not satisfied its initial burden of production to establish facts which the

nonmovant cannot overcome or demonstrate that the nonmoving could not supply evidence which would substantiate its claim, then summary judgment should be denied because the movants initial burden of production has not been met. Cleotex Corp., Id. 477 U.S. at 331. (Quoting Justice Brennen, dissenting; [the dissent is quoted because "the majority and dissent both agree as to how the summary judgment burden of proof operates...." Wright, Miller, Cane, Federal Practice and Procedure, Civil 2d §2727, Pocket Part, 1993]).

Aside from the fact that the petitioner was denied an opportunity to produce evidence as discussed above, the district court apparently did not believe the petitioner would ever be able to produce evidence which would substantiate her claim. The Court of Appeals agreed with the assessment of the district court.

The petitioner maintains that the respondents have failed to satisfy the initial burden of production in order to substantiate their motion for summary judgment. The petitioner was terminated from her employment for an implied breach of trust in accepting certain scholarship funds from Vanderbilt University, a nonparty in this lawsuit. The petitioner also received a grant-in-aid from the respondents in order that she could pursue her studies at Vanderbilt University.

There was nothing in the grant-in-aid agreement signed by the petitioner which would preclude her from receiving funds from other sources except that she could not receive aid from another source which would require a service obligation. The funds received from Vanderbilt University required no service obligation on the part of the petitioner. Yet, the entire justification

which the respondents have proffered for terminating the petitioner's employment was that the petitioner was terminated for a breach of trust because she received the funds from Vanderbilt University without reporting the receipt of the funds to the respondents. But the respondents have never stated what the breach of trust was or how the receipt of the funds and the nonreporting of the receipt of the funds was a breach of the terms of either her employment or the receipt of the grant-in-aid funds. The petitioner has attempted to draw attention to this fact. The respondents have never established a nexus between the actions of the petitioner and the breach in express or implied terms of her contract. Indeed, the respondents have never demonstrated that their offer of evidence and affidavits has any true

relevance to the petitioner's cause of action.

This Court is invited to grant the writ of certiorari because the district court abused its discretion in granting the motion for summary judgment where the respondents failed to meet their initial burden of production and produce evidence which is relevant and goes to the heart of the substantive issues of law in this case.

III

THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW RENDERED BY A STATE ADMINISTRATIVE BOARD ACTING IN A JUDICIAL MANNER MUST BE GIVEN PRECLUSIVE EFFECT IN THE DISTRICT COURT.

The question is whether the Court erred in not giving preclusive effect to certain findings of fact of the State Administrative Hearing where said certain issues of fact were fully adjudicated and the respondents appealed said administrative decision

through the entire administrative appeal process when the proceedings were conducted in a judicial manner. This Court in University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed. 2d 635 (1986) held that fact findings of state administrative bodies acting in a judicial capacity would be given preclusive effect in federal courts and that the doctrines of collateral estoppel and *res judicata* would apply.

When the petitioner was terminated from her employment, she applied for benefits to the Tennessee Employment Security Division, a state administered agency, for unemployment benefits. At the hearing, the respondents vigorously opposed the petitioner's application for unemployment benefits stating that she was guilty of intentional work-related misconduct. The issues of fact were whether the petitioner intended to received duplicate financial aid

for the same expenses. At the initial administrative hearing and through the entire appeals process, the petitioner prevailed in showing that she was not culpable of intentionally attempting to receive duplicate financial aid for the same expenses. Both the district court and the court of appeals believed the petitioner's reliance on Elliott was misplaced.

The court of appeals asserted that the petitioner's reliance was misplaced because the allocation of the burden of proof was different in a discrimination case verses an unemployment compensation claim.

But at those hearings, all of the issues of fact and law were heard pursuant to the agency's judicial procedures and all of the parties were the same except that the administrative level, respondent Vaden was not a named party. But, he was a witness and acted in his official capacity there.

Although the burdens of proof may be different, the petitioner conclusively established that she was culpable of any intentional wrong-doing through the vigorous ebb and flow of the process and it is clear that the petitioner conclusively established that she did not intentionally do any wrong. (Appendix, R - 18-23). The point is that she would prevail on that issue regardless of the form or nature of proceeding. Clearly, the petitioner has met the standard preclusion because, as this Court said in Elliott, policy is served "by giving preclusive effect to state administrative fact finding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results." 478 U.S. at 798. See, Morris v. Esmark Apparel, Inc., 832 S.W.2d 563 (Tenn.App.1991) where the court held that the doctrines of res judicata and collateral estoppel are

effect to quasi-judicial decisions of state administrative agencies and that it is the responsibility of the loser at said quasi-judicial hearing to seek judicial review or be bound by said decision. Morris, 832 S.W.2d at 566.

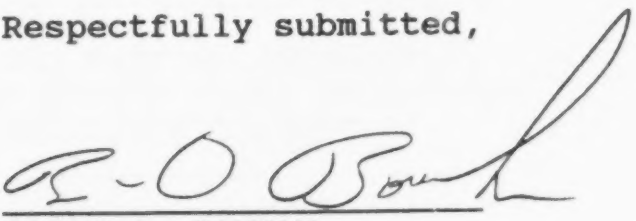
It is apparent that the courts below found that the petitioner's privity with Vanderbilt to be a factor which the respondents considered as justification for the discharge. Because the entire thrust of the respondents' justification for terminating the petitioner's employment was predicated upon the petitioner's dealings with Vanderbilt University, the failure of the courts to give the state administrative hearings a preclusive effect was error and unfairly prejudiced the petitioner. Especially since the result is obviously conflicting but the result was in favor of the petitioner where the issue was fully

litigated in a forum of examination and cross-examination and the result went against the petitioner where the result was reached by way of summary judgment without the benefit of examination or cross-examination of the respondents or their witnesses.

CONCLUSION

For all of the foregoing reasons, this Petitioner for Writ of Certiorari should be granted.

Respectfully submitted,



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No. 95-_____

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TENNESSEE BOARD OF REGENTS and JAMES R. VADEN, Treasurer and Vice Chancellor, Tennessee Board of Regents, in his individual and official capacity

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
MIDDLE DIVISION

GLADIES M. HERRON,	]	
	]	
Plaintiff,	]	
	]	
v.	]	No.3:92-1150
	]	JUDGE WISEMAN
	]	JURY DEMAND
TENNESSEE BOARD OF REGENTS, et al.,	]	
	]	
	]	
Defendants.	]	

MOTION TO STAY DISCOVERY

Defendants, pursuant to Rule 29 of the Federal Rules of Civil Procedure and Rule 11(b) of the Local Rules for the Middle District of Tennessee request that this Court issue an Order staying discovery and extending the time required to file a Proposed Scheduling Order. In support of this Motion, Defendants would show:

(1) On or about March 18, 1993, Plaintiff served Defendants with Plaintiff's

First Set of Interrogatories Propounded to the Defendants and Request for Production of Documents.

(2) Defendant has not served any discovery.

(3) The parties have not submitted a Proposed Scheduling Order.

(4) Defendants have filed a Motion To Dismiss And/Or For Summary Judgment.

(5) The Motion is predicated on the fact that Plaintiff's case is barred by the applicable Statute of Limitations and that Plaintiff has failed to state a claim upon which relief can be granted.

(6) If the Court resolves this procedural issue in defendants' favor, the case will be dismissed.

(7) Plaintiff's outstanding discovery is directed solely to the merits of the case.

(8) The interests of justice will be served because a discovery stay, at this time, will allow counsel to narrow the issues and complete pretrial discovery, if necessary, in the most cost effective manner.

Plaintiff does not object to this Motion.

WHEREFORE Defendants ask the Court to issue an Order staying discovery on both sides and staying the submission of the Proposed Scheduling Order until after the Court rules on Defendants' Motion To Dismiss And/Or Summary Judgment.

Respectfully submitted,

CHARLES W. BURSON ATTORNEY GENERAL AND REPORTER

_____

LESLIE ANN BRIDGES
Assistant Attorney General

_____

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Assistant Attorney General

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GLADIES M. HERRON,	]	FILED 10-08-93
	]	
Plaintiff,	]	
	]	
v.	]	No. 3:92-1150
	]	
TENNESSEE BOARD OF REGENTS et at.,	]	
	]	
Defendant.	]	

MEMORANDUM

This case is before the court on defendants' motion for summary judgment. For the reasons herein set out, summary judgment is granted and the case is dismissed.

I

The plaintiff, Ms. Gladies M. Herron, was employed by the Tennessee Board of Regents ("TBR") as a financial management analyst from 1983 to 1991. In April of

1989, she complained to her superior that the amount of salary paid to persons in her position was inequitable relative to the salary paid to persons in another, supposedly comparable position within the Tennessee Regents System. No pay increase was received as a result of this request, but TBR did undertake a study of the fairness of the pay disparity. In June of the same year the plaintiff reiterated her claim and disputed the methodology of the study used to compare the job positions at issue, but again she received no pay increase as a result.

In July of 1989, the plaintiff was offered a promotion and salary increase, but she refused the offer on the grounds that the pay increase was insufficient and would not relieve the inequity she perceived. Approximately a month later the plaintiff was offered a second promotion with a

slightly higher pay increase, but again this promotion was rejected. Neither of the plaintiff's rejections of the promotions mentioned racial discrimination as a ground.

Prior to the above events, in April of 1988, the plaintiff decided to enroll in a part-time doctoral program in higher education administration at Vanderbilt University, in order to improve her abilities and enhance her chances of advancement. The plaintiff requested that TBR fund part of her studies pursuant to a provision of the settlement agreement in the Geier case, see Geier v. Alexander, 593 F. Supp. 1263 (M.D.Tenn.1984), whereby minority faculty development within the Tennessee State University System was to be facilitated by grants-in-aid. In plaintiff's request for these funds, she explicitly stated that she would notify TBR of the receipt of any other sources of

educational funding so that the grant-in-aid funds might be accordingly reduced. TBR agreed to this request and began disbursements to Vanderbilt on the plaintiff's behalf. By the terms of the grant-in-aid agreement, the plaintiff was to use these funds only for tuition, fees, and textbooks, not for supplies. In exchange for this grant-in-aid, the plaintiff was to provide service to TBR for a specified time or, if this time commitment could not be fulfilled, was to pay back any or all of the funds.

Shortly after receiving approval for the grant-in-aid, plaintiff also received a half tuition minority scholarship from Vanderbilt. Receipt of this scholarship was contingent on the plaintiff's informing Vanderbilt of funding from any other sources and on plaintiff's satisfactory academic progress.

Plaintiff continued her doctoral studies for the next couple of years, receiving both grant-in-aid and Vanderbilt funds during this time. It is undisputed that the plaintiff never informed the Vanderbilt Business School of her receipt of the TBR grant-in-aid funds, and it is unclear whether she informed TBR of her Vanderbilt scholarship. It is clear that plaintiff periodically withdrew funds from her student account at Vanderbilt. Part of these withdrawals was used to buy a computer and other educationally-related products, but it is unclear as to how all of the withdrawn money was used. At some point, Vanderbilt officials became aware of the plaintiff's regular withdrawals from her student account and investigated. On learning of the plaintiff's TBR funding and of plaintiff's non-notification of such funding, the plaintiff's Vanderbilt

scholarship was revoked.

The plaintiff, in a letter seeking reconsideration of the revocation, wrote that the TBR funds she had received were pursuant to a lawsuit still under court review (thus the nature of these funds should remain private, according to the plaintiff) and that all funds received would be paid back; moreover, the plaintiff explicitly stated that the TBR funds were "neither a scholarship, grant, loan, nor assistanship [sic]." Defs.' Ex. Y. This statement was made notwithstanding the fact that the agreement signed by plaintiff stated that it was a "Grant Agreement." The Dean of the Vanderbilt Business School, Joseph Cunningham, looked into the plaintiff's responses and concluded that the plaintiff had not in fact fulfilled her obligations pursuant to the scholarship and thus the scholarship was rightfully revoked.

Dean Cunningham informed TBR of the scholarship matter, and TBR requested a meeting with the plaintiff to discuss it. Shortly thereafter, in April of 1991, the plaintiff was terminated and was told she was to pay back the grant-in-aid funds received. The Chancellor of TBR cited, as the basis for termination, the Vanderbilt incident and the plaintiff's explanations and subsequent actions with regard to that event, as well as plaintiff's actions regarding the TBR funds.

In June of 1992, the plaintiff applied for the position of chief accountant with the Metropolitan Public Schools of Davidson County ("Metro"). With plaintiff's consent and signed release, Metro requested recommendations from past employers, including TBR. In this request Metro specifically asked if and why the plaintiff had been terminated and whether the past

employer would re-employ the plaintiff. TBR responded to this request by verifying the plaintiff's dates of employment, and her job position, but TBR stated that only this information could be furnished at the time for TBR and the plaintiff were involved in litigation.

Plaintiff filed suit against TBR and its Chancellor, alleging employment discrimination and retaliatory discharge, on December 30, 1992, over a year after her termination. Specifically, plaintiff alleged that she had been discriminated against on the basis of race and that her firing was in retaliation for her requests for pay increases. Also, plaintiff alleged that TBR's notice to Metro that she and TBR were involved in litigation was in retaliation for the filing of an earlier state lawsuit. Defendants' have now moved for summary judgment or for dismissal due to

failure to state a claim.

The standards governing the decision on a motion for summary judgment are well-established. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a mater of law. Cleotex Corp. v. Catrett, 477 U.S. 317,322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed. 2d 265 (1986); Street v. J.C.Bradford & Co., 886 F.2d 1472, 1476-80 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. Cleotex, 477 U.S. at 323. Upon meeting this burden, the burden shifts to the nonmoving party, who cannot rest on its pleadings but must present some "specific facts showing that there is a genuine issue for trial." Id. at 324. A dispute about a material fact is "genuine" within the meaning of Federal Rule

of Civil Procedure 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "The mere existence of a scintilla of evidence is support of the plaintiff's position will be insufficient." Id. at 252. The Court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. Id. at 255,

There are several procedural problems with plaintiff's case (e.g., possible statute of limitations problems, sovereign immunity problems), but the largest problem is substantive. The plaintiff has rested solely on her pleadings to support her claims. She presents no "specific facts showing that there is a genuine issue for trial." To avoid summary judgment on an

employment discrimination claim, a plaintiff may not rest on the fact that she is African-American and was terminated. To make out a retaliatory discharge claim, a plaintiff may not rest on the temporal sequence of noise-making followed by termination, especially when there is a significant intervening event that may alone justify the termination and when there is no evidence that the "noise-making" in question was perceived as threatening or problematic by the employer. In short, some concrete, affirmative proof of discriminatory or retaliatory intent or effect must be offered to establish a prima facie employment discrimination case, not to mention to rebut an employer's legitimate, nondiscriminatory reason for its actions. See Gagne' v. Northwestern Nat'l Ins. Co., 881 F.2d 309 (6th Cir. 1989). Plaintiff does no more than assert that her firing for breach of

trust--an imminently reasonable ground for such firing given the plaintiff's financially-sensitive employment position--was pretextual and that the real reason was racist and retaliatory.

Even drawing all disputed facts in the light most favorable to the plaintiff, there remains no genuine dispute about the presence of discrimination or retaliation in this case. Ample time for discovery has been allowed, and plaintiff has had time to file two responses to the defendants' motion. Yet no credible evidence to sustain the claim or rebut defendants' position has been put forth. Therefore, the defendants are entitled to summary judgment on all claims. See Leahy v. Trans Jones, Inc., 996 F.2d 136, 138 (6th Cir. 1993) ("If, after being allotted sufficient time for discovery, the opposing party is unable to demonstrate that he or she can produce the

evidence required by the criteria of Liberty Lobby, summary judgment is appropriate." (quoting Street v. J. C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989)).

III

Plaintiff offers insufficient evidence of retaliatory discharge or discrimination to proceed. Defendants' motion for summary judgment shall be granted in an accompanying Order.

Thomas A. Wiseman, Jr.
U.S. District Judge

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

NO. 93-6529

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLADIES M. HERRON,]
]
Plaintiff-Appellee,]
]
v.]
]
TENNESSEE BOARD OF]
REGENTS, et al.,]
]
Defendant-Appellant.]
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

Argued:

Decided:

BEFORE: MARTIN and BATCHELDER, Circuit Judges, and COHN, District Judge.

PER CURIAM: Gladies M. Herron appeals the district court's grant of summary judgment in favor of the Tennessee Board of Regents and James R. Vaden, in her Title VII action alleging racial discrimination and

retaliatory discharge. For the following reasons, we affirm the district court's decision to grant summary judgment.

Herron, an African-American, was employed by the Board of Regents as a financial management analyst from 1983 to 1991. In April 1989, Herron complained that her salary was inequitable compared to that paid another, comparable position. She requested a salary increase of between $10,000 and $17,000. No pay increase was forthcoming as a result. However, in July of that year, she was offered a promotion and salary increase. The salary offered was $37,000. Herron refused this offer, however, claiming that the published salary range was between $40,000 and $50,000. On the same day, Stephanie Faulkner, a white employee holding the same position as Herron, was also offered the same promotion for the identical salary and accepted. In

June 1990, Herron was offered this promotion a second time, with yet a higher pay increase, but still refused to accept it.

Although she already held a Master's Degree in Business Administration, Herron decided to return to school in 1988, to enhance her career advancement opportunities. She enrolled in a part-time doctoral program at Vanderbilt University in higher education administration. As part of the settlement agreement reached in the case of *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984), to facilitate minority faculty development, Herron received grant-in-aid funds from the Board. In requesting these funds, Herron said she would notify the Board if she received any other sources of funding, so that the grant-in-aid funds might be reduced accordingly. The grant-in-aid funds were to be used for tuition, books, and fees, not supplies. In exchange

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amounts from her Vanderbilt student account. Part of this money was used to buy a sound system, amplified speakers, cassettes, and other educationally-related items.

In October 1990, Vanderbilt finally became aware of the dual receipt of funds and withdrawals from Herron's student account. Despite notices admonishing Herron that, by accepting the George Peabody College scholarship money, she had agreed to notify the department if she received an additional award from an outside source, Herron apparently never informed the department she was receiving grant-in-aid funds. Vanderbilt withdrew its scholarship and also notified the Board of Regents that Herron had been receiving it. Vaden, the Treasurer and Vice Chancellor of the Board, received a copy of a letter from the Dean of the George Peabody College. In this letter, the Dean outlined Herron's receipt of

duplicate funds, her concealment of that fact, her failure to notify the department of the grant-in-aid funds, and her claim that those funds were not actually financial aid because they were received pursuant to a lawsuit still under review. Despite having signed a "Grant Agreement" to receive them, Herron stated that the grant-in-aid funds were "neither a scholarship, grant, loan, nor assistan[t]ship."

On April 19, 1991, the Board terminated Herron for breach of trust and instructed her to pay back the grant-in-aid funds she had received. In June 1992, Herron applied for a position with the Metropolitan Public Schools of Davidson County. With her consent, the school system requested recommendations from Herron's past employers, including the Board. The request asked if and why Herron had been terminated and whether the board would re-employ her.

In response, the Board verified her dates of employment and position, but refused to furnish more information because the Board and Herron were involved in litigation at that time.

This is the second of two discrimination lawsuits Herron filed based upon these facts. Initially, she filed suit in state court, but voluntarily dismissed that claim in October 1992. On December 30, 1992, Herron filed suit against the Board and Vaden in federal court. She alleged employment discrimination and retaliatory discharge. Specifically, she claimed she was discriminated against because of her race and that she was terminated in retaliation for requesting pay increases. She also claimed that the Board's response to her prospective employer was in retaliation for her filing an earlier state lawsuit. The Board and Vaden moved for

dismissal or summary judgment, arguing that Herron's claims were barred by the applicable statute of limitations and that she could not rebut the legitimate, non-discriminatory reasons they offered for her discharge. On October 8, 1993, the district court granted their motion for summary judgment. This timely appeal followed.

Herron makes four arguments on appeal. First, she claims that summary judgment was precluded because the district court previously granted a motion to stay discovery. She argues next that her termination for breach of trust was merely pretextual. She also asserts that the findings of the Tennessee Department of Employment Security should have been given preclusive effect by the district court. Finally, she claims there is a genuine issue of material fact regarding her retaliatory discharge claim.

The district court's decision noted that "ample time for discovery ha[d] been allowed" Herron disputes this conclusion, claiming that the motion to stay discovery was the equivalent of issuing "a summary judgment *sau sponte*." She claims she was "blindsided" by the summary judgment and should be "afforded a fair opportunity to present her evidence."

Herron's second argument is that the Board's "breach of trust" rationale is merely pretextual and that her termination was really racially motivated. She maintains that the Board and Vaden "have never stated what the breach in trust was." She points to evidence of Vanderbilt's receiving the grant-in-aid fund (receipts for tuition, etc.) and equates that with notice to her department of the additional funds. She further claims that the money was not financial aid, but somehow became

part of her employment contract because she agreed to continue to provide services to the Board.

Third, Herron claims that the Tennessee Department of Employment Security's finding that she had "no intent to receive duplicate financial aid for the same expenses," should be given *res judicata* effect in this litigation. She claims that the Board should now be estopped from claiming intentional work-related misconduct.

Finally, Herron asserts she received disparate treatment and that this was racially motivated. She says the Board has still not defined "breach of trust." She argues that when refusing the promotions offered to her, she did not mention racial discrimination because she believed at that time that the Board was an equal opportunity employer. She claims the Board never offered an explanation as to why she was

treated differently than other, white employees. She then relies on the "continuing violation" doctrine to maintain that her claims of salary and promotion discrimination are not time-barred. However, she offers no explanation as to how this affects a decision to dismiss a cause of action on the merit.

The Board and Vaden respond by claiming: that the district court acted within its discretion in granting the stay of discovery; that they did not discriminate regarding Herron's salary or promotions; that her termination was not retaliation; and, that the findings of the state agency are not preclusive here.

The Board notes first that Herron did not oppose their motion to stay discovery. Relying upon local rules, they equate her failure to file a response with not opposing the motion. They claim that Herron

disregarded all opportunities to conduct discovery. In response to its summary judgment motion, she filed no motion under Rule 56(f) of the Federal Rules of Civil Procedure asking for a continuance. Instead, her response provided no compelling reason to justify a continuance and set out no specific reasons demonstrating the need for further discovery. The issue involved was whether the Boards' legitimate, non-discriminatory reason for her discharge was pretextual. Although she requested permission to depose people at Vanderbilt concerning her dual receipt of funds, Herron never asked to depose anyone involved with the decision to discharge her.

In response to Herron's claim that no explanation was offered as to why she was treated differently than white employees, the Board maintains she never established that she was treated differently. Herron

says the issue is a question of the Board's intent regarding her allegedly disparate treatment, and therefore summary judgment is inappropriate. But, the Board notes that Herron did not present any evidence of unlawful motive to create an issue for trial. The Board points to language from a decision of this Court in a breach of employment contract case: "Ordinarily, a jury question is presented when there is a dispute as to the 'true reason' for discharging an employee. However, to reach the jury, . . . the employee [must] present 'evidence that [she] was really discharged for another reason." *Pachla v. Saunders Sys., Inc.*, 899 F.2d 496,499 (6th Cir. 1990) (quoting *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980). The Board argues that merely asserting that this is so is not the same as presenting evidence.

Next, the Board addresses Herron's claim of retaliatory discharge.

> To establish a prima facie claim of retaliatory discharge, plaintiff must establish: (1)that [she] engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) that [she] was subject to adverse employment action subsequent to or contemporaneous with [her] protected activity; (3) there is a casual connection between the protected activity and the adverse employment action.

Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co., 783 F.2d 50,54 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1986). Here, the Board argues Herron did not engage in any protected conduct; she had not participated in any Title VII proceeding and did not oppose any discrimination at the time. Indeed, she did not accuse the Board of any racial discrimination until after she had been discharged. The Board maintains that Herron has failed to make out a prima facie

claim. Instead, the Board has offered a legitimate, non-discriminatory reason for Herron's discharge: her "questionable and fraudulent financial dealing."

Last, the Board addresses Herron's claim that Tennessee Department of Employment Security's findings should be given *res judicata* effect. Herron's reliance on *Elliott v. University of Tennessee*, 478 U.S. 788 (1986), is misplaced. Unemployment compensation hearings differ substantially from discrimination cases, particularly as to the allocation of the burden of proof. In Title VII cases such as this one, plaintiff carries the ultimate burden of proving racial discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once the plaintiff has proved her prima facie case of racial discrimination under *McDonnell-Douglas Corp.*

v. Green, 411 U.S. 792 (1973), the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the action taken against plaintiff. The plaintiff then has an opportunity to prove that the "legitimate" reasons were mere pretext. *Burdine*, 450 U.S. at 253. But, the ultimate burden of persuasion remains with the plaintiff at all times. *Id.* at 252. This is not the case in unemployment compensation claims where all that must be proven is employment and discharge.

This Court reviews a grant of summary judgment *de novo*. *Moore v. Holbrook*, 2 F.3d 697, 698 (6th Cir. 1993). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of

material fact. *Cleotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once this burden is met, it shifts to the non-moving party, who cannot rest on her pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The existence of a mere scintilla of evidence in support of the non-moving party's position will not suffice to defeat summary judgment. *Id.* at 252. Finally, all evidence is viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Upon review, we affirm the judgment of the district court. In granting the Board's motion for summary judgment, the district court stated:

> To avoid summary judgment on an employment discrimination claim, a plaintiff may not rest on the fact

> that she is African-American and was terminated. To make out a retaliatory discharge claim, a plaintiff may not rest on the temporal sequence of noise-making followed by termination, especially when there is a significant intervening event that may alone justify the termination and when there is no evidence that the "noise-making" in question was perceived as threatening or problematic by the employer. In short, some concrete, affirmative proof of discriminatory or retaliatory intent or effect must be offered to establish a prima facie employment discrimination case, not to mention to rebut an employer's legitimate, nondiscriminatory reason for its actions. *See Gagne' v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309 (6th Cir. 1989). Plaintiff does no more than assert that her firing for breach of trust--an imminently [sic] reasonable ground for such firing given the plaintiff's financially-sensitive employment position--was pretextual and that the real reason was racist and retaliatory.

We agree with this assessment. Herron was a public official whose job duties included conducting audits for state colleges and universities. In receiving dual funds for

the same expenses to attend school, she engaged in dishonest and arguably fraudulent financial conduct involving state funds. Even on appeal, Herron does no more that make conclusory assertions as to the true reason behind her discharge. Herron has put forth no credible evidence to sustain her claim of discrimination and retaliation or to rebut the Board's legitimate, non-discriminatory rational.

The decision of the district court granting summary judgment in favor of Vaden and the Tennessee Board of Regents is therefore AFFIRMED.